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In The

# Supreme Court of the United States

October Term, 1975

No. 75-210

JAMES A. CAPEHART, ET AL.,
*Petitioners,*

v.

CITY OF CHESAPEAKE,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

## BRIEF FOR RESPONDENT CITY OF CHESAPEAKE IN OPPOSITION

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Dated: September 5, 1975

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## BRIEF FOR RESPONDENT CITY OF CHESAPEAKE IN OPPOSITION

The City of Chesapeake hereby respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

### I.

### QUESTIONS PESENTED

1. Whether this Court will review a state court's decision when no federal question was raised or considered below.

2. Whether any federal right is denied by the Virginia Supreme Court's declaring its decision of Virginia law to be prospective only.

## II.
## STATEMENT OF THE CASE

Following the Virginia Supreme Court's opinion in *Perkins* v. *County of Albem*arle, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing,* 214 Va. 416, 200 S.E.2d 566 (1973) holding that Albemarle County's geographical assessment methodology violated the uniformity provision of the Virginia Constitution,[1] Petitioners[2] filed their Application for Relief in the State court, quoting extensively from the *Albemarle* opinion when making their allegations of fact. The City demurred on the ground, *inter alia,* that Taxpayers had based their Application on the *Albemarle* case which the Virginia Supreme Court in its rehearing opinion had made prospective only. The effect of the City's demurrer was to say that, even if its methodology were conceded to be piecemeal and segmental and therefore in violation of the Virginia Constitution under *Albemarle,* the Taxpayers had no remedy in light of the Virginia Court's holding on prospectivity. On the basis of memoranda and oral argument, the trial judge agreed and sustained the City's demurrer.

Taxpayers filed a Petition for Appeal to the Virginia Supreme Court, arguing that their Application stated a cause of action under the Virginia Constitution. No argument was advanced that Taxpayers' Application stated a cause of action under, or that the trial court's ruling had denied them any right secured by, federal law. [A copy of the Taxpayers' Petition for Appeal is reprinted in the Appendix hereto for the convenience of this Court.] The Virginia Supreme Court, considering only the grounds of State law presented, found no error and denied the appeal.

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[1] Constitution of Virginia (1971) art. X, § 1.

[2] Hereinafter, Petitioners will be referred to as "Taxpayers" and Respondent, the City of Chesapeake, as the "City."



## III.
## ARGUMENT

### A.
### Taxpayers Did Not Raise A Federal Question In The Court Below

While the second and third paragraphs of Taxpayers' Application invoked the trial court's jurisdiction to determine issues of federal and Virginia constitutional law, it was apparent that the Application was grounded in the Virginia Constitution only. Taxpayers' Application was patterned after *Perkins* v. *County of Albemarle,* 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing,* 214 Va. 416, 200 S.E.2d 566 (1973), a case decided on the basis of the uniformity provision of the Virginia Constitution. The Application even quoted repeatedly the Virginia Supreme Court's rubric "piecemeal, segmental assessment methodology." The City's demurrer asserted that the Taxpayers' case was grounded on the *Albemarle* case, and the trial judge so held.

On appeal to the Virginia Supreme Court Taxpayers reaffirmed that their case was founded on State law, saying in their Petition for Appeal [Appendix, *infra,* p. 2]:

> "Taxpayers' " application was rooted in Article X, Section 1 of the Constitution of Virginia . . . .

No claim was made to any right or privilege under the Constitution or laws of the United States. Indeed, reference to the Table of Citations in the Taxpayers' Petition for Appeal discloses that not a single federal case, constitutional provision or statute was cited to the Virginia Supreme Court. If Taxpayers even pleaded a federal question, that point was not pressed in the trial court and was clearly abandoned on appeal to the Virginia Supreme Court. In

both Virginia courts the taxpayers relied exclusively on the uniformity requirements of the Virginia Constitution.

Since no federal question was presented to or passed upon by the Virginia Supreme Court, this Court should decline to review the decision below. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Herndon* v. *Georgia,* 295 U.S. 441 (1935).[3] Not only does the record fail to disclose that the court below passed upon a federal question as required by this Court, *see, e.g., Bailey* v. *Anderson,* 326 U.S. 203 (1945), the record affirmatively shows that the court below did not. This Court has consistently refused to decide federal issues raised for the first time on review of state court decisions, *Cardinale* v. *Louisiana, supra,* and cases cited therein at 438. It should likewise refuse to do so here.

**B.**

**The Virginia Supreme Court's Decision To Make Its Holding Of Virginia Law Prospective Only Does Not Deny Taxpayers Any Federal Right**

The Virginia Supreme Court's landmark decision in *Perkins* v. *County of Albemarle*, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing,* 214 Va. 416, 200 S.E.2d 566 (1973) was in sharp contrast to the rulings of a number of state courts upholding cyclical assessment methodologies.[4] *E.g., State* ex rel. *Park Investment Co.* v. *Board*

[3] Taxpayers' Petition for Certiorari, at 5, erroneously asserts that this Court has jurisdiction to review the judgment of the Virginia Supreme Court under 28 U.S.C. § 1254(1) (1970). This is clearly not the case. If this Court has jurisdiction at all, it is by 28 U.S.C. § 1257(3) (1970). Under either statutory provision, federal questions not presented in the court below should not be considered by this Court. *See, e.g., Cardinale* v. *Louisiana, supra; McCullough* v. *Kammerer Corp.,* 323 U.S. 327 (1945).

[4] In a purely geographical or cyclical methodology, the taxing jurisdiction is divided into a number of segments and appraisals are made in only one geographical segment each year. Taxes are assessed on the basis of the most recent appraisal. Thus, a jurisdiction operating on a three year cycle will always be taxing one-third of its properties on the basis of current valuations and two-thirds on the basis of appraisals made in earlier years.



*of Tax Appeals,* 32 Ohio St. 2d 28, 289 N.E.2d 579 (1972); *Carkonen* v. *Williams,* 76 Wash. 2d 617, 458 P.2d 280 (1969); *Skinner* v. *New Mexico Tax Comm'n,* 66 N.M. 221, 345 P.2d 750 (1959); *Rogan* v. *County Comm'rs,* 194 Md. 299, 71 A.2d 47 (1950); *Hamilton* v. *Adkins,* 250 Ala. 557, 35 So. 2d 183, *cert. denied,* 335 U.S. 861 (1948). Since this Court had approved, absent some showing of intentional discrimination, a methodology which did not reassess all properties within the jurisdiction in one year, *Sunday Lake Iron Co.* v. *Township of Wakefield,* 247 U.S. 350 (1918), the *Albemarle* case applies a more stringent test under the Virginia Constitution than is required under the Fourteenth Amendment of the United States Constitution.

Stunned representatives of Virginia State and local government joined Albemarle County in seeking a rehearing.[5] Following argument on rehearing, the Virginia Supreme Court stood by its holding. But moved by the specter of financial chaos in local government, it made its decision prospective only as to non-party litigants. *Perkins* v. *County of Albemarle,* 214 Va. 416, 418, 200 S.E.2d 566, 568 (1973).

Applying a decision announcing new principles of law prospectively is within the discretion of a court of last resort to avoid inequities and provide for the orderly administration of government. It is a remedy frequently employed by this Court, *see, e.g., Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), and cases cited and discussed therein

[5] Amicus briefs in support of Albemarle County's Petition for Rehearing were filed by the Attorney General of Virginia, the Virginia Municipal League, the Virginia Association of Counties and the Virginia Association of Assessing Officers.

at 105-106, and by state supreme courts. *See, e.g., Russman* v. *Luckett,* 391 S.W.2d 694, 699 (Ky. 1965); *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P.2d 1241, 1266 (1971); *Robinson* v. *Cahill,* 62 N.J. 473, 303 A.2d 273, 298, *cert. denied,* 414 U.S. 976 (1973). The Virginia Supreme Court's denial of relief to Taxpayers by applying its holding in the *Albemarle* case prospectively only states no claim under the United States Constitution. As was said in *Great Northern R.R.* v. *Sunburst Oil & Ref. Co.,* 287 U.S. 358, 364 (1932):

> We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal Constitution.

The effect of the City's demurrer was to admit for purposes of the demurrer that its assessment methodology was piecemeal, segmental and non-uniform under the Virginia Constitution.[6] This admission, however, was of no avail to the Taxpayers in light of the Virginia Supreme Court's decision to make its holding in the *Albemarle* case prospective only. This is a question of Virginia law which denies Taxpayers no federal rights and which this Court has no jurisdiction to review.

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[6] The City emphatically denies that its assessment methodology is piecemeal, segmental or non-uniform. Its assessment methodology actually ranks well in the Commonwealth of Virginia and the United States. The *1973 Virginia Sales Assessment/Sales Ratio Study,* an annual publication of the Virginia Department of Taxation, shows that the index of inequality (also referred to as a coefficient of dispersion) for the City was 13.7% with a regression index of 0.99. Experts in the assessment field generally recognize that less than 20% shows an acceptable degree of uniformity; less than 15% is good; and less than 10% is excellent. The regression index measures the relationships between assessments of high priced versus low priced real estate. A value of 1.00 indicates absolute uniformity. Chesapeake's .99 shows near perfection.



## IV.

## CONCLUSION

Taxpayers below grounded their case solely on their rights under State law and fell squarely within the ambit of the Virginia Supreme Court's discretionary ruling. They cannot raise federal questions for the first time in this Court in an effort to gain the forum denied by State law. The Supreme Court of Virginia wisely determined to make its decision of State law prospective in application to avoid fiscal chaos. This decision is peculiarly within the province of the Virginia Court in dealing with matters of a purely local nature. It presents no denial of due process or any other federal right. For these reasons the writ should be denied.

Respectfully submitted,

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**PROOF OF SERVICE**

I, Harry Frazier, III, counsel for the Respondent and a member of the bar of the Supreme Court of the United States, hereby certify that pursuant to Rule 33 of the Rules of the Supreme Court of the United States all parties required to be served have been served with copies of the foregoing Brief for Respondent City of Chesapeake in Opposition by mailing three copies thereof by first class mail, postage prepaid, to Henry E. Howell, Jr., Esquire, Howell, Anninos, Daugherty & Brown, 808 Maritime Tower, Norfolk, Virginia 23510, counsel of record for Petitioners, this fifth day of September, 1975.

HARRY FRAZIER, III
*Counsel for the*
*City of Chesapeake*

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## PETTTION FOR APPEAL

### I.

### STATEMENT OF MATERIAL PROCEEDINGS

Appellants herein are a group of taxpayers owning properties within a portion of Washington District of the City of Chesapeake and will hereafter be referred to as "Taxpayers."

"Taxpayers" filed an application for relief from erroneous unconstitutional assessments of their land and alleged that the assessments in the City of Chesapeake were not uniform. The application was filed pursuant to Section 58-1145 of the Code of Virginia.

The City of Chesapeake filed a demurrer to the application alleging the application did not state a cause of action under Section 58-1145.

After hearing, Judge Ligon L. Jones, who was designated to sit in the case, entered final order sustaining the demurrer and dismissed "Taxpayers" application for relief.

"Taxpayers" seasonably noted this appeal.

### II.

### ASSIGNMENTS OF ERROR AND QUESTIONS PRESENTED

"Taxpayers" assigned as error, the following:

"1. The Court erred in entering its Order of October 16, 1974, sustaining the demurrer of the defendant, City of Chesapeake, Virginia, dismissing landowners' Application and denying the relief therein prayed for."

The sole question presented by this appeal is whether or not "Taxpayers" application stated a cause of action.

## III.

## STATEMENT OF FACTS

The posture of the pleadings required the City of Chesapeake to accept the allegations contained in "Taxpayers" pleading as admitted.

These facts are:

1. Applicants were all owners of real properties within the described portion of the Washington District of the City of Chesapeake.

2. That each of the properties had been subjected to erroneous and unconstitutional assessments.

3. The assessments were not uniform in application.

4. That in 1964 the City of Chesapeake enacted an ordinance requiring the annual assessment of all real estate within the City.

5. Since 1967 there was no annual uniform assessment of real estate in the City of Chesapeake.

6. Commencing in or about 1968, the City of Chesapeake engaged in a method of assessment pursuant to a piecemeal, segmental assessment methodology.

7. As a result of the erroneous and unconstitutional assessment "Taxpayers" taxes on the properties involved were illegally raised.

## IV.

## ARGUMENT

### A.

### "Taxpayers' " Application Stated A Cause Of Action.

"Taxpayers' " application was rooted in Article X, Section 1 of the Constitution of Virginia, which provides, in part:



> "* * * All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, * * *"

This constitutional guarantee has existed in Virginia for many years.

From time to time the legislature has framed remedies to assist the taxpayer in procuring the benefits of the guarantee.

One remedy which was designed to afford taxpayers an economical and expeditious method of securing their right to uniform taxation is Section 58-1145 of the Code of Virginia.

On March 5, 1975, when "Taxpayers" application was filed, the section read as follows:

> "Application to court to correct erroneous assessments of local levies generally.—Any person assessed with county or city levies or other local taxes on real estate, aggrieved by any such assessment, may, unless otherwise specially provided by law, within two years from the thirty-first day of December of the year in which any such assessment is made, and any person assessed with local levies on personal property or a local license tax, aggrieved thereby, may, within one year from the thirty-first day of December of the year in which the assessment is made, apply for relief to the circuit court of the county or any city court of record of the city wherein such assessment was made. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or if the court in its discretion finds the ends of justice would be met by making an adjustment, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made.

> In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment on a parcel of real estate is improper or is based on obvious error and should be corrected in order that the ends of justice may be served, the commissioner shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer. Such application may include a petition for relief for any of several taxayers."

The language of the first paragraph reading:

> "* * * or if the court in its discretion, finds the ends of justice would be met by making an adjustment, * * *"

were added by the General Assembly in 1968. However, applicants are not relying on this language. This language was found unconstitutional by reason of vagueness and in 1974 the legislature passed an amendment that substituted the words:

> "* * * or that the assessment is otherwise invalid or illegal, * * *"

The bill contained an emergency clause and the amendment became effective April 4, 1974.

Commencing in or about 1968, the City of Chesapeake began to break down the City into geographical segments for the purpose of employing the assessment technique of "continuous maintenance" or as the technique is sometimes described "regular maintenance." Contrary to law, this technique was not employed annually on a jurisdictional at large basis, but in the years here involved was applied to the geographical segment in which the applicant's properties are situated to the exclusion of properties located in the remainder of the City of Chesapeake. Said method of assessment is unconstitutional by reason of being conducted pursuant to a piecemeal segmental assessment methodology.



"Taxpayers" alleged that the procedure of assessing a different area of the City each year produced an unconstitutional lack of uniformity in their tax bills that became due and payable December 5, 1973, and in some instances bills that became due and payable on December 5, 1972.

Section 58-1145 afforded a specific remedy whenever assessment of real estate was not uniform in its application.

The Application contained clear allegations of a lack of uniformity and was not subject to demurrer.

**B.**

**Section 58-1145 Was An Ideal Remedy Available To "Taxpayers."**

Section 58-1145, which had its origins as Tax Code Section 414 prior to recodification of the Code of Virginia, was the ideal remedy to procure the benefits guaranteed to "Taxpayers" under the Constitutions of both Virginia and the United States.

In *Chesapeake and Potomac Telephone Company of Virginia* v. *City of Newport News,* 194 Va. 409 (1952), this Court stated:

> "Relief under these statutes is not confined to the correction of an assessment which is merely erroneous. They embrace also levies and assessments claimed to be unconstitutional, illegal and void. * * *
>
> "The object of these statutes was to furnish an expeditious and inexpensive remedy against taxes which have been assessed or collected. They are to be liberally construed in order to further the remedy so provided. * * *"

In *Carl L. Todd* v. *County of Elizabeth City,* 191 Va. 52 (1950), this Court considered the propriety of seeking tax relief from the alleged unconstitutional assessment of real estate to cover the cost of collecting garbage through a bill

in equity. Defendants filed demurrer to the bill on the ground the plaintiffs had an adequate remedy at law and the lower court overruled the demurrer, but this court reversed the lower court and sustained the demurrer. In its opinion this Court pointed to Section 58-1145, formerly Tax Code Section 414, as amended, stating at page 56:

> "Taxpayers were granted relief under section 414 from local levies and assessments held to be unconstitutional and void. * * *"

C.

**"Taxpayers" Right To Recover Illegally Collected Taxes Was Not Proscribed By Perkins v. Albemarle County.**

The City's demurrer alleged that the relief "Taxpayers" sought was barred by the opinion on rehearing by this Court in *Perkins* v. *Albemarle County,* 214 Va. 416 (1973), by reason of the ruling being prospective only.

*Perkins* v. *Albemarle County* merely illuminated a remedy and right which "Taxpayers" were entitled to for many years as underscored by numerous opinions prior to *Perkins.*

In *Rixey's Executors* v. *Commonwealth of Virginia,* 125 Va. 337 (1919) in a proceeding for a relief from taxes on certain intangible property based upon alleged erroneous assessments between the years 1911 and 1917, the Court said at page 352:

> "* * * 'An examination of those authorities * * * discloses that it is a systematic, intentional discrimination, by those administering the tax system of a State (whether as directed by statute or contrary to statute) against a person, by an assessment of the property of such person at a higher rate of valuation than that applied to the same kind of property of other persons whose property is taxed in the same jurisdiction, which is condemned by such authorities and held to be a



> denial to the person first referred to of the due process of law and the equal protection of the laws guaranteed to them by the federal Constitution.' * * *."

See also *Richmond* v. *Eubank,* 179 Va. 70 (1942), where petitioner sued for a refund of sewer taxes after a decision by this Court declaring the ordinance imposing the sewer taxes void. The action was brought under Section 414 of the Tax Code, which is now incorporated into Sections 58-1145 - 58-1151. The defendant, City, argued that a one year statute of limitation was applicable, and that petitioner was barred from relief because suit was not instituted in time. The Court held that a two year statute of limitation controlled, and suit was, therefore, timely filed. But even if the one year statute did apply, the Court said, plaintiff was not barred from relief, at page 84:

> "* * * The ordinance imposing the sewer tax being unconstitutional, 'it is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' *Campbell* v. *Bryant,* 104 Va. 509, 516, 52 S.E. 638.
>
> "This being true, there is no ordinance in force, within the purview of Code sec. 6336 to be construed. All sums collected under the ordinance are sums illegally collected and held by the city. * * *"

"Taxpayers" again emphasize that the *Perkins* decision was declarative of no new substantive rights and could not and did not erode "Taxpayers" rights under Section 58-1145.

## V.

## CONCLUSION

For the reasons stated this Court should, as promptly as possible, overrule the Order of the Lower Court dismissing "Taxpayers' " Application and remand the cause for a prompt determination of "Taxpayers' " rights.

Respectfully submitted,

APPLICANTS,

By: /s/ HENRY E. HOWELL, JR.
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